

AB-452 (Sub-No. 1X)<sup>1</sup>THE WESTERN STOCK SHOW ASSOCIATION--  
ABANDONMENT EXEMPTION--IN DENVER, CO

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Decided June 12, 1996

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The Board considers a request by WSSA (1) for the discontinuance by three rail carriers of operations over two rail lines WSSA owns in the Denver Stockyards in Denver, CO, (2) for an exemption to permit WSSA to abandon the two lines following discontinuance of operations, and (3), alternatively, for an order fixing the terms of compensation WSSA should be paid by carrier Denver Terminal Railroad Company for its continued exercise of tracking rights on WSSA's property. The Board finds that the record supports discontinuance by two carriers of trackage rights over portions of one corridor but that, otherwise, WSSA has failed to establish (1) that the present or future public convenience and necessity require or permit the proposed discontinuance and abandonment, or (2) that the Board should issue an order setting the terms of compensation WSSA should be paid.

BY THE BOARD:<sup>2</sup>

By applications filed August 29, 1995, the Western Stock Show Association (WSSA or applicant) asked the Interstate Commerce Commission (ICC) to find that the public convenience and necessity require or permit the discontinuance of service by the Burlington Northern

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<sup>1</sup> AB-6 (Sub-No. 374) *Burlington Northern Railroad Company--Adverse Discontinuance--in Denver, CO*, AB-33 (Sub-No. 92) *Union Pacific Railroad Company--Adverse Discontinuance--in Denver, CO*, AB-446 (Sub-No. 2) *Denver Terminal Railroad Company--Adverse Discontinuance--in Denver, CO*, were consolidated in decisions served October 13 and 19, 1995.

<sup>2</sup> The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC or Commission) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10903. Therefore, this decision applies the law in effect prior to the ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

Railroad Company (BN), the Union Pacific Railroad Company (UP), and the Denver Terminal Railroad Company (DTRC), doing business as Denver Rock Island Railroad, over two lines of railroad adjacent to WSSA's facilities in the Denver Stockyards, in Denver, CO. WSSA concurrently filed a petition for an exemption from the requirements of 49 U.S.C. 10903-04 to permit it to abandon the line.

The track at issue involves approximately 6,400 feet of main line track and 4,000 feet of siding located at the Denver Stockyards in Denver, CO. The track lies in two corridors: The "River Corridor" track, generally running along the South Platte River, and the "National Western Drive Corridor" (hereafter NWD Corridor) track, generally running along National Western Drive, a roadway in the area.

WSSA filed a petition for waiver of and exemption from the requirements that it file certain information and give certain notices required by statute at 49 U.S.C. 10904 and by regulation at 49 CFR part 1152. The petition was granted in a decision served October 19, 1995. Those requirements envision the filing of an application by a railroad seeking discontinuance authority, and do not reflect the nature of the case that arises when an application is filed by a third party.

Protests to the applications were filed by the Denver Stockyard Business and Property Owners Association (the Association), DTRC, BN, and Pepcol Manufacturing Co. (Pepcol). Pepcol also filed comments in response to the abandonment exemption petition. The Railway Labor Executives' Association (RLEA) submitted a letter in each proceeding seeking the imposition of labor protective conditions on any discontinuance or abandonment authorizations. In response to requests by each of the protestants, by a decision served October 13, 1995, the ICC instituted an investigation and solicited supplemental evidence on a number of specified issues. WSSA, DTRC, BN, and the Association filed statements. WSSA filed a rebuttal.

DTRC opposes WSSA's request that this agency authorize the discontinuance of its trackage rights. BN opposes, in part, WSSA's similar request concerning BN's trackage rights. The Association supports the positions of DTRC and BN and it also opposes WSSA's proposed abandonment. UP did not file a statement.

## BACKGROUND

WSSA. WSSA is a non-profit association organized for educational purposes. It educates young people in livestock management and practices and educates urban communities regarding agricultural issues and practices. One of the principal means of fulfilling its objectives is by presenting the annual National Western Stock Show in Denver, CO every January. To conduct its activities, particularly the presentation of the annual stock show, WSSA owns property and facilities adjacent to the South Platte River in the Denver Stockyards area.

*The WSSA rail lines.* WSSA owns 2 rail lines that traverse its property, essentially north to south: the River Corridor, which runs along the western side of WSSA's property, and the NWD Corridor, which runs through the center of the property. The NWD Corridor terminates on the south at East 46th Street. The River Corridor joins the NWD Corridor at a point approximately 350 feet north of East 46th Street. Segments of track that serve Pepcol's facilities, including industrial track, branch off the River Corridor at a point approximately 600 feet north of its intersection with the NWD Corridor. As will be further discussed below, WSSA does not seek any discontinuance or abandonment of these segments.<sup>3</sup> Both corridors terminate on the north at Franklin Street. In addition, a northeastern segment of the NWD Corridor terminates after crossing Race Court, another local street. WSSA does not indicate that it owns additional rail properties.

*The tenant carriers.* BN claims to have trackage rights over the River Corridor for its entire length and over the NWD Corridor from its junction with the BN main line track on the south to, but not across, Race Court on the north. A BN main line runs along the eastern side of the Denver Stockyards and connects with the southern end of the NWD Corridor at East 46th Street. BN's "Jersey Cutoff" line connects with the main line and the NWD Corridor at East 46th Street and also connects with a segment of the River Corridor that serves Pepcol's facilities.

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<sup>3</sup> BN operates over southern portions of the corridors in serving Pepcol. WSSA proposes not to disrupt such service. We will discuss this matter below.

BN provides direct switching service to Pepcol. BN interchanges cars with DTRC to serve two shippers on the River Corridor and three on the NWD Corridor. Service to the shippers apparently is provided via track at the southern end of the Stockyards area.

DTRC is a Class III carrier that performs terminal switching service at two locations in Denver, one of which is the Stockyards area. DTRC operates over the length of the two corridors in the Stockyards area pursuant to rights WSSA granted it in an agreement of December 10, 1993 (see the discussion in Appendix A). DTRC provides switching service for two shippers on the River Corridor and three on the NWD Corridor.

UP appears to hold trackage rights over nearly the length of both corridors. It has not operated over the lines for many years. It has not participated in this proceeding. Greater certainty on our part, however, is not necessary to our resolution of WSSA's request as to UP's trackage rights.

*The shippers.* Pepcol maintains facilities at the southern end of the River Corridor. It processes inedible packinghouse products and ships products that are used for animal feed. Pepcol is served by BN. It ships approximately three carloads a week of liquid tallow, primarily to points in Texas. In 1994, Pepcol shipped 175 cars of animal products, and in the first 9 months of 1995, it shipped 108 cars. Approximately 50% of Pepcol's revenue is derived from the sale of tallow. If rail service were not available for its tallow shipments, Pepcol asserts, it would be difficult to compete in its present markets. Pepcol estimates that, based on an annual volume of 150 tank cars, a change to truck transportation would cost it an additional \$694,000 a year.

Drywall Products receives wallboard by rail and truck and distributes it locally. It has used rail service in the Stockyards area for the last 12 years, and it recently entered into a long-term lease agreement based on the assumption that rail service would continue to be available. This shipper has been using DTRC's service on the River Corridor and has found it reliable. During 1994, Drywall Products received 117 cars of

wallboard, and, during the first 9 months of 1995, it received 144 cars.<sup>4</sup> Drywall Products asserts that, if it were forced to rely on trucking service, its operations would be severely affected. It estimates that its transportation costs would increase by more than \$160,000 annually. This shipper indicates, also, that a shift to truck service would require it to reconfigure its warehouse facility. Further, Drywall Products asserts that the primary road servicing the area, National Western Drive, cannot safely handle additional truck traffic, as it is extremely narrow at points, lacks acceleration/deceleration lanes, and has insufficient shoulders.

Power Assist maintains facilities near the northern end of the River Corridor. It receives rail deliveries of methanol, which it uses as a power booster in aircraft applications. A firm located on the Power Assist premises also uses the methanol as a windshield washer solvent. This shipper has storage tanks located near the River Corridor, into which it unloads the methanol. The product then is trucked from the tanks to its plant. When Power Assist purchased its present facilities, it relied on the continuing presence of rail service. It specifically constructed methanol receipt and storage facilities at the rail siding site to accommodate rail deliveries. Power Assist receives supplies by truck during the winter season when demand is low, but it is dependent upon rail service during the high volume summer months. It received 23 carloads in 1994, but only 2 during the first 9 months of 1995. Power Assist asserts, however, that it anticipates continuing to receive an average of 15 cars a year, and that, were it forced to switch to truck service, its costs of operation could increase by as much as \$135,000 annually. Like Drywall Products, Power Assist notes the inadequacy of National Western Drive, and it adds that the road is particularly hazardous during the winter months.

Denver Hardwoods is a distributor of flooring products. Its facilities are located near the southern end of the NWD Corridor. The large majority of its shipments move by truck, but Denver Hardwoods does receive some switching service from DTRC. In 1994, this shipper received six cars, and, in the first 9 months of 1995, it received one car.

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<sup>4</sup> DTRC adds that this shipper recently began to receive shipments on center-beam cars via the NWD Corridor in addition to its long-time receipt of shipments on flatcars via the River Corridor.

Rocky Mountain Pipe is a producer and distributor of pipe and related products. Its facilities are situated near the northern end of the NWD Corridor. Rocky Mountain receives shipments of plastic pellets. However, because of service difficulties experienced prior to DTRC's initiation of service, Rocky Mountain's supplier is unwilling to use direct rail service. Therefore, Rocky Mountain receives railcars at a point 20 miles south of the Stockyards area, transloads its shipment into trucks at that point, and moves its plastic pellets to the NWD Corridor where they are transferred into railcars that are used for storage. In 1993, Rocky Mountain received 43 carloads of plastic pellets. In 1994, however, its traffic was shifted to the transload site, except for six carloads delivered by DTRC. Rocky Mountain asserts that it is attempting to renegotiate an agreement with its supplier that will allow rail transportation direct to its location in the Stockyards. If Rocky Mountain is successful, its rail shipments over the NWD Corridor would increase to approximately 100 cars annually.

Christian Salvesen is a public cold storage warehouse located on the far north end of the NWD Corridor, north of Race Court. Christian Salvesen's customers route traffic into and out of the warehouse, primarily by truck. The warehouse does receive service from DTRC, however, and it indicates that a number of the contracts upon which it makes bids require access to rail service.

In order to minimize the interference with WSSA's operations and any risk to the public, Drywall Products, Power Assist, Rocky Mountain, and Christian Salvesen express a willingness to reduce and modify rail shipping activity during the periods in which WSSA holds its stock shows.

The Association asserts that businesses operating in the Denver Stockyards area have received rail service for over a century, and that current businesses in the Stockyards set up there in reliance on the continuation of rail service. It avers that DTRC has been providing acceptable service and, as a result, there has been a steadily increasing reliance on rail transportation in the area. In the Association's view, an unrelated dispute between WSSA and DTRC, which now threatens rail service for innocent third parties, forms the basis of the instant proceedings.

*The DTRC proceeding.* As indicated in Appendix A, a December 10, 1993 agreement between WSSA and DTRC gave the carrier the right to operate over the subject lines until October 31, 1994. The agreement has expired without the parties being able to reach a renewal agreement.

Apparently, DTRC is continuing to operate over the lines, but the parties have not presented evidence regarding the terms of such operations.

1. *WSSA arguments for adverse discontinuance.* In support of adverse discontinuance, WSSA argues that: (1) shippers would not be harmed by a loss of DTRC's service; (2) DTRC is unwilling or unable to obtain insurance coverage adequate to protect WSSA and the public; (3) the carrier is in default of its contractual obligation to make certain periodic payments; (4) the carrier is unwilling or unable to pay any rental for the use of WSSA's property; and (5) DTRC's operation over the involved lines is not economically viable.

WSSA characterizes the traffic evidence of record as vague. From that evidence, WSSA calculates that DTRC handled 158 cars on the lines during the first 9 months of 1995, all but 14 for Drywall Products. Applicant avers that Power Assist has been receiving methanol by truck and that it now finds truck delivery more economical than rail. WSSA asserts that Denver Hardwoods, having received a single rail car during the first 9 months of 1995, relies almost entirely on motor carrier service. Applicant argues further that Christian Salvesen is primarily oriented to truck transportation and that Rocky Mountain simply is not a rail shipper. Each of the shippers, WSSA asserts, has satisfactory alternative transportation available. It emphasizes that the area is served by city streets that provide ready access to the major highways serving the Denver area.

WSSA estimates the annual traffic of Drywall Products at 200 cars. As this shipper is situated in the River Corridor above the Pepcol facility that BN would continue to serve, applicant suggests a plan under which Drywall Products could continue to receive service in the event of a grant of the requested discontinuances and abandonment. WSSA asserts that it is prepared to lease to Drywall Products, as an industrial spur that BN has agreed to serve, the 1,500 feet of track applicant estimates would be needed for continued rail service, at an annual rental of \$6,750. Applicant states that the rental cost would be far less than the \$160,000 that Drywall Products claims would be the cost of switching from rail to motor service. In any event, WSSA disputes the size of shipper's motor carrier transportation cost estimate and asserts that the extra one to two trucks a day that would have to travel along National Western Drive to serve Drywall Products would not cause serious congestion.

WSSA has determined that DTRC's liability insurance coverage is inadequate to protect WSSA in the event of a rail accident on WSSA property. First, DTRC's insurance policy assertedly is an "indemnity" policy that would indemnify the rail carrier for its losses above a \$25,000 deductible. Applicant argues that, under such a policy, the insurer is obligated to reimburse DTRC for amounts of any claim or adverse judgment actually paid by the carrier and that, to the extent a claim exceeds DTRC's assets, and to the extent WSSA is also found liable, there is no guarantee that the insurance provides any protection to WSSA. Further, applicant contends that the \$2 million per incident minimum coverage required by the December 10, 1993 agreement between the parties is inadequate to meet reasonably foreseeable losses. WSSA notes that the methanol that DTRC transports for Power Assist is a hazardous commodity, and it details the serious risks to persons and property that can result from a spill or explosion of methanol. WSSA contends that liability coverage of at least \$10 million is necessary to ensure that it is adequately protected.<sup>5</sup> WSSA indicates that the annual cost of a policy providing \$10 million in coverage, with a \$25,000 deductible and first dollar defense coverage, would be approximately \$55,000 a year.

WSSA also contends that there is a problem with DTRC in the area of "tail coverage" or "tail insurance." Under what WSSA calls a "standard" insurance policy, an insurer will pay for losses resulting from events occurring during the term of the policy, regardless of when the claim actually is made. Under a "claims made" policy, which applicant asserts DTRC holds, the insured is protected only against claims that are actually made during the term of the policy. Once a claims made policy terminates without renewal, the former insured, and other beneficiaries of the insurance, have no continuing coverage. In such circumstances, tail insurance, which provides coverage against claims that arose during the term of a claims made policy but that were not submitted until after the expiration of such a policy, affords protection. As applicant avers that

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<sup>5</sup> In support of its argument, applicant presents a statement by insurance broker William R. Felton. Mr. Felton opines that a minimum level of insurance coverage of \$10 million per occurrence is appropriate here. He bases his opinion, in part, on the fact that DTRC is conducting switching operations involving hazardous materials in an urban area.

DTRC's insurance policy is a claims made policy, it argues that tail coverage is essential.

The 1993 agreement between WSSA and DTRC required the carrier to make monthly payments of \$1,000 to applicant for the purchase of tail insurance for the term of the agreement, as it might be extended, until the sum of \$30,000 had been accumulated. (The agreement also gave applicant the right to use the deposits for the payment of 1994 property taxes and assessments on certain railroad right-of-way and trackage.) Applicant indicates that DTRC made seven of the required monthly payments but then defaulted. Applicant believes that the rail carrier should make a one-time payment of \$55,000 to purchase 7-year \$10 million tail coverage.

The 1993 agreement contained no provision for the payment of rent. (WSSA previously had charged rent of \$2 a year under its September 22, 1989 lease.) Applicant complains that DTRC is not paying it a fair rental for the use of the rail properties. WSSA presents statements of surveyor Thomas Staab and real estate appraiser Robert E. Dean, Jr. The witnesses indicate that the land area of the NWD Corridor is 1.5289 acres, of which a 0.310 acre portion will not be abandoned but will continue to be used for rail service to Pepcol.<sup>6</sup> The witnesses indicate that the land area of the River Corridor is 3.996 acres, of which a 600 foot strip at the southern end, accounting for 0.712 acres, will continue to be used in rail service for Pepcol. The witnesses thus indicate that the total land area involved is 5.525 acres, of which a total of 1.022 acres will continue to be used by BN in service for Pepcol.

Based on comparable sales analysis, Mr. Dean estimates the unit value of the property at \$1.40 per square foot. He thus concludes that the total value for the two railroad corridors is approximately \$337,000, which includes a value of approximately \$62,300 for the property over which Pepcol will continue to be served. Mr. Dean applies a rental rate \$0.15 per

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<sup>6</sup> Although Mr. Staab calculated the total NWD Corridor acreage as 1.728, both he and Mr. Dean decided to use the City and County of Denver Assessor's figure of 1.5289.

square foot to the total acreage and concludes that an annual rental of \$36,100 is reasonable.<sup>7</sup>

WSSA requests that, in the event the Board does not grant its application for adverse discontinuance of DTRC's trackage rights, the Board prescribe terms and conditions for the rail carrier's continued operations. Applicant requests that DTRC be required to: (1) pay the property taxes on the property over which it operates; (2) carry railroad comprehensive liability insurance with a policy limit of not less than \$10 million, showing WSSA as an additional insured; (3) establish an escrow account adequate to purchase 7-years tail insurance coverage in the same amount, if the insurance policy is a claims made policy; (4) pay annual rent of \$36,100, payable monthly in advance; and (5) post an irrevocable letter of credit with WSSA adequate to secure its prescribed financial obligations for not less than 6 months.

2. *DTRC response.* DTRC responds, first, by advancing claims to property rights.<sup>8</sup> The carrier asserts that it owns a portion of the tracks in the NWD Corridor jointly with BN, having acquired an undivided one-half interest in those tracks from UP in April 1995. DTRC also asserts that it is the sole owner of the tracks in the River Corridor. It indicates that, in 1982, WSSA's predecessor, Denver Union Corporation (Denver Union), conveyed those tracks by quitclaim deed to Colorado and Eastern Railway Company (C&E) which, in December 1993, conveyed those tracks to DTRC.<sup>9</sup>

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<sup>7</sup> It is unclear why Messrs. Staab and Dean separately calculated the acreage and acreage value of the portions of the corridors BN uses to serve Pepcol but then did not deduct the acreage or acreage value when determining rental DTRC should pay. It may be WSSA's position that, as DTRC operates over all the subject track (even though it does not serve Pepcol), it should pay rent based on the full acreage and acreage value. The record is not clear on this point.

<sup>8</sup> DTRC has not specified the context of its ownership claims, other than its claim regarding an easement. Nevertheless, the claims are relevant to several issues, including the costs of operating and the use of WSSA property without paying rent.

<sup>9</sup> DTRC acknowledges that, in 1989, its prior owners purported to convey the tracks in the River Corridor to WSSA. The carrier asserts, however, that its predecessor did not have title to the tracks at that time. DTRC also contends that, when C&E conveyed certain land to WSSA in 1989, it did not convey the tracks.

DTRC contends that it operates in the NWD Corridor pursuant to a perpetual easement. It indicates that, on March 22, 1976, WSSA's predecessor, Denver Union, granted UP an easement to operate over the corridor. DTRC asserts that UP thereafter assigned it the easement on April 28, 1995. DTRC notes that the easement does not provide for the payment of any rent for the use of WSSA property. Based on its claim of ownership of the perpetual easement, DTRC contends that the Board lacks jurisdiction to modify or adversely discontinue the carrier's trackage rights over the NWD Corridor.<sup>10</sup>

Regarding its operations, DTRC asserts that it has stabilized and improved rail service in the Stockyards area, and that its shippers have indicated that they are very pleased with its service. DTRC avers that it is ready, willing, and able to continue providing service. It asserts that its rail service is resulting in increasing traffic. In 1994, its first year of operations, DTRC's Stockyards Division handled 158 carloads. During the 12-month period ending September 30, 1995, that division accounted for 219 carloads, an increase of 39%. DTRC shows that its 1994 revenues were \$59,560, and its costs were \$52,751, yielding an operating profit of \$6,809. For the 12 months ending September 30, 1995, the carrier earned revenues of \$81,818 and incurred costs of \$64,125, yielding an operating profit of \$17,693, an increase of 160%.

DTRC asserts that none of the traditional hallmarks of approval of discontinuance of service is reflected in the record. Operations are profitable; there is no current or imminent operating loss; no track rehabilitation is required; and no opportunity costs are incurred. In short, the carrier argues, there is no basis for a finding that continued operation would burden DTRC or interstate commerce. Indeed, DTRC contends that a discontinuance of its service in its Stockyards Division would severely harm it by depriving it of 45% of its traffic and of the profits derived from handling that traffic. It adds that discontinuance not only would deprive it of the opportunity to develop additional freight traffic for movement over the subject line, but also would jeopardize its ability to continue to provide service to shippers on the

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<sup>10</sup> We will examine and dispose of this argument in our "Discussion and Conclusions" section, below. Suffice it to say here that DTRC contends that the Board must dismiss the adverse discontinuance application as it pertains to the NWD Corridor, and it refers solely to the River Corridor in advancing many of its arguments.

other lines it operates in Denver. In contrast to the public harm that DTRC and its shippers would suffer as a result of a discontinuance, the carrier argues, any harm to WSSA that would result from a denial of discontinuance would be narrow, private harm.

DTRC strongly disagrees with the terms WSSA would have the Board impose on its continued operations under trackage rights. First, DTRC argues that the Board should not impose a requirement that it pay rent. It points to longstanding rail carrier use of the lines in the Stockyards area without a rental requirement: UP paid no rent for its now-discontinued operations on the NWD Corridor; BN pays no rent for its operations on the River Corridor; DTRC, under prior ownership, paid only a nominal rental of \$10 under its 5-year lease of September 22, 1989; and DTRC had no rental obligation under its agreement of December 10, 1993. DTRC avers that applicant has not explained why it now seeks to collect substantial rental, and that applicant's action is designed solely to force the carrier off the property. DTRC notes that, even if its service were to be discontinued, applicant would not be able to collect rent for operations on the River Corridor, as BN, under its existing agreement, has the right to operate over the corridor without paying rent. DTRC asserts that, should the Board nevertheless decide to impose a rental requirement, it should adopt the \$6,061 per year figure that its real estate appraiser witness James D. Jennings has determined is reasonable for use of the River Corridor.<sup>11</sup>

DTRC also strenuously disagrees with WSSA's contentions that the public interest requires DTRC to have liability insurance coverage of at least \$10 million per occurrence. The carrier points out that applicant has accepted \$2 million in insurance coverage since 1989. DTRC argues that

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<sup>11</sup> As noted above, DTRC claims that the Board has no jurisdiction to impose terms regarding operations on the NWD Corridor. Mr. Jennings recalculates the involved area of the River Corridor as 2.8868 acres. He eliminates the southern 900 feet of the corridor, which he finds is the length of track used by BN. (As noted above, WSSA had used a figure of 600 feet and also had declined to deduct the resulting acreage from its total for the River Corridor.) Mr. Jennings uses as the western boundary of the acreage a line that is 10 feet west of the center of the westernmost track. (WSSA had used a line 15 feet west of the center line.) Further, Mr. Jennings asserts that, as DTRC needs only an *easement* to operate on the River Corridor, he applies a fair market value of \$0.45 per square foot to the acreage to arrive at a value of \$56,587 for the easement. He then multiplies the value by 10.71%, the same yearly net rental value as used by applicant, to arrive at \$6,061.

WSSA's demand for five times the insurance coverage is designed to force displacement of the carrier rather than to respond to legitimate concerns. DTRC adds that the fact that motor carriers transporting methanol must have \$5 million in insurance coverage does not support a requirement that a shortline railroad performing sporadic, low-speed transportation of that commodity should have the same or greater coverage. DTRC also notes that, contrary to WSSA's contentions, the carrier's current policy does name WSSA as an additional insured.

In support, a DTRC witness, insurance agent Louis M. Schillinger, disputes WSSA's contention that current insurance coverage for shortline railroad operations in urban areas is usually at or above \$10 million per occurrence. Mr. Schillinger states that DTRC is classified as "minimum-premium," and that whether or not hazardous materials are transported is not a criterion in that classification unless such transportation makes up a large percentage of the carrier's total tonnage. In Mr. Schillinger's experience, it is not customary in the shortline railroad industry for minimum-premium carriers to carry \$10 million per occurrence in coverage.<sup>12</sup>

DTRC asserts that WSSA has failed to provide any evidence supporting a requirement that DTRC carry tail coverage. The carrier asserts that tail coverage generally is not required for low-density, shortline rail carriers. In support, Mr. Schillinger indicates that the tail limit in the railroad insurance industry is 5 years, not 7 as suggested by WSSA. He adds that, in any event, such coverage is very expensive, is not required in contracts he has seen in the past 5 years, and is not required for on-going rail operations.

DTRC agrees to pay property taxes, although it does not specify the property on which such taxes should be based. It indicates that the 1993 agreement was silent on the matter, except that it stated that WSSA could pay such taxes out of an account funded by the carrier. DTRC does not know whether WSSA paid the property taxes out of that account as no

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<sup>12</sup> Regarding WSSA's position that DTRC's policy should have a \$25,000 deductible and first dollar defense coverage, Mr. Schillinger indicates that deductibles and first dollar defense are not available in the railroad insurance market. WSSA does not dispute that point in its rebuttal.

property tax bills were submitted to DTRC for payment during the term of the agreement.

Finally, DTRC sees no justification for the requirement that it post an irrevocable letter of credit to secure payment of its obligations. The carrier asserts that the reason it failed to timely make its final two payments for purchase of tail insurance is that WSSA failed to deposit the payments into an interest-bearing account and to provide an accounting to DTRC, as required by the parties' agreement.

3. *WSSA's rebuttal.* In rebuttal, WSSA asserts that DTRC owns none of the property rights it claims. Regarding the track in the NWD Corridor, WSSA asserts that, at the time UP issued DTRC a bill of sale on April 28, 1995, UP had no interest to convey: in 1976, UP had executed a quitclaim deed to Denver Union for its interest in the NWD Corridor and, in turn, had obtained an easement over the property. Because, under Colorado law, railroad tracks are fixtures, UP's 1976 quitclaim deed to Denver Union conveyed all of UP's interest, including its interest in the tracks. Moreover, WSSA asserts that the easement in the NWD Corridor did not cover the entire corridor; it began at a point approximately where Denver Hardwoods now is located and extended to a point short of the Franklin Street extended right-of-way line. Additionally, WSSA asserts that, in 1983, UP abandoned rights south of the above-described segment, thereafter had no way to gain access to it, and accordingly ceased using its easement. WSSA asserts that, thus, UP had abandoned the easement. Therefore, WSSA contends, when UP assigned its 1976 rail use easement to DTRC in 1995, it had no easement to convey.

Regarding DTRC's claim to own tracks in the River Corridor, WSSA asserts that, on September 22, 1989, C&E quitclaimed all of its interest in the properties in the Stockyards area to WSSA. WSSA asserts that the quitclaim deed conveyed to it all of C&E's interest in the real property, including the track, which, as stated above, is a fixture under Colorado law. If Denver Union's 1982 quitclaim deed had conveyed an interest in the track to C&E, WSSA points out, then C&E's 1989 quitclaim deed likewise conveyed the track to WSSA. Applicant adds that the terms of the September 22, 1989, Business Lease between WSSA and DTRC, permitting the carrier to remove surplus tracks, shows that WSSA owned the tracks and does not suggest that applicant had sold them to the carrier.

Regarding the rental issue, WSSA argues that there is no merit to arguments that DTRC can obtain use of property without charge simply because another carrier has a claim to use the property without charge, or because there is an asserted practice of making the Stockyards area trackage available without compensation. The circumstances, motives, and business purposes behind the 1989 and 1993 agreements between WSSA and DTRC, applicant argues, do not affect the issue of what compensation is due WSSA when DTRC uses its property, assertedly under government compulsion. Further, WSSA sees no basis for excluding any portion of the NWD Corridor or the River Corridor, including the portion used by BN to serve Pepcol, from the property on which DTRC must pay a reasonable rental. Finally, applicant argues that the rental rate should reflect the fact that the carrier is depriving WSSA of any use of its entire interest, and that the carrier should pay a rental predicated on the full fair market value of the property.

*The BN proceeding.* BN provides direct switching service to Pepcol on a segment of the River Corridor not proposed for discontinuance or abandonment. It serves customers other than Pepcol on the subject lines by means of interchange with DTRC. In support of adverse discontinuance, WSSA asserts that BN has not exercised its trackage rights on the subject lines for many years, no shippers on the lines rely on BN for service under the trackage rights, and continuing the rights in place would severely burden applicant if they frustrated its proposed abandonment. WSSA, apparently relying on its presentation in the DTRC proceeding, also argues that the lines are hopelessly uneconomic.

BN has provided rail service to the Stockyards area for more than 100 years. It indicates that it has records supporting eight trackage rights agreements dating from 1913 to 1948. A 1917 agreement between WSSA's predecessor and BN's predecessor is the primary basis for BN's trackage rights along the entire River Corridor.<sup>13</sup> BN opposes the discontinuance request as it relates to the River Corridor. It likewise opposes the abandonment exemption petition as it relates to the River Corridor.

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<sup>13</sup> BN indicates that, over the past 80 years, there have been so many track additions, deletions, and relocations within the Stockyards that it is not possible to correlate any trackage rights grant with any specific existing track.

BN supports the termination of its rights over the NWD Corridor with one exception. BN provides daily service to Pepcol at the south end of the River Corridor. The railroad intends to continue to do so. It avers that, while WSSA proposes to allow it to retain trackage rights over a 600-foot section of the River Corridor to facilitate service for Pepcol, BN actually needs 900 feet of the River Corridor track north of the intersection of the west right-of-way of National Western Drive and the River Corridor track. In any event, BN intends to reserve the right to serve Drywall Products and other shippers on the River Corridor in the future should DTRC relinquish its rights on that corridor.

BN contends that WSSA has submitted no evidence concerning the present or future rail traffic to and from the River Corridor. To the contrary, BN asserts, applicant addresses only the level of compensation and insurance protection that it alleges it should receive from DTRC. The extent to which shippers on the River Corridor rely on BN and DTRC assertedly has not been considered. BN contends that WSSA has fallen far short of carrying the substantial burden it bears in this adverse discontinuance proceeding.

BN points out that it must traverse 350 feet of track along the south end of the NWD Corridor to reach the trackage on the River Corridor from which it serves Pepcol. It thus opposes discontinuance of its trackage rights over that portion of NWD Corridor track. Otherwise, however, BN concurs with WSSA and, in fact, supports discontinuance of its rights over the NWD Corridor.

Because of DTRC's presumed continued service on the NWD Corridor, BN asserts, discontinuance of its trackage rights thereon would have no immediate impact on any shipper on that corridor. BN adds that the two shippers that might be affected in the event of DTRC's future cessation of service (Denver Hardwoods and Rocky Mountain) have not opposed BN's discontinuance. BN indicates that its provision of switch service along the NWD Corridor would require a rehabilitation cost of \$24,000 and an annual maintenance cost of \$4,800. It asserts that the minimal traffic along the line cannot justify such expenses. BN adds that, as it has not performed switch service over the NWD Corridor for at least 15 years, no employee would be adversely affected. Nevertheless, it is willing to accept the imposition of employee protective conditions on a grant of discontinuance authority.

In rebuttal, WSSA asserts that BN has not demonstrated that it has trackage rights on one or more of the tracks now in place. It asserts, further, that, in light of the traffic levels it reports (averaging fewer than one car per switch), BN cannot explain why it needs 900 feet of the River Corridor track to serve Pepcol.

WSSA argues that BN has not explained why uncertain, unused trackage rights on the River Corridor should continue to burden applicant when there is no demand for BN's use of them. Applicant states that, if discontinuance and abandonment were granted, it would enter into an agreement with BN that not only would give BN clear rights to continue serving Pepcol, but also would permit access to shipper Drywall Products. Further, applicant asserts that, in the event of grants, it would enter into a lease arrangement with Drywall Products that would permit BN to serve it.<sup>14</sup> Applicant asserts that, at most, adverse discontinuance would prevent BN from serving Power Assist, a shipper that received only two cars in the first 9 months of 1995.

*UP proceeding.* WSSA indicates that UP's trackage rights in the Stockyards area stem from an easement for a right-of-way that WSSA's predecessor Denver Union granted to UP on March 22, 1976. Applicant asserts, however, that, to its knowledge, UP does not currently claim to have any trackage rights over the subject lines.

WSSA further asserts that UP has not exercised its trackage rights on the lines for at least 15 years. Indeed, it emphasizes, tracks that would permit UP access to the lines have been removed. Applicant avers that no shippers on the lines would be harmed by a discontinuance, as none is served under UP's trackage rights. It concludes that continuing the trackage rights in place would severely burden WSSA if they resulted in frustrating its proposed abandonment.

UP has not filed a reply or otherwise participated in this proceeding.

*The WSSA abandonment proceeding.* WSSA bases its case on the position that the lines in question are hopelessly unprofitable. It contends that continued operation is possible only because DTRC is operating in breach of its existing agreement with WSSA, is transferring large risks to

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<sup>14</sup> As previously noted, WSSA would lease track in the River Corridor to shipper at a rental of \$6,750 a year.

applicant, and is using applicant's property without charge. WSSA contends that, if DTRC were required to provide \$10 million in liability insurance coverage, to accumulate a reserve for tail insurance in that amount, and to pay WSSA rental for the use of its property, the carrier's expenses (not even considering costs of operation) would greatly exceed its projected 1995 revenues.

WSSA complains that it is suffering harm by virtue of the fact that it is subsidizing DTRC's operation by making property available without charge and assuming substantial uninsured risk. Harm to shippers and to the community resulting from an abandonment, applicant argues, would be minimal. According to applicant, only one shipper, Drywall Products, is receiving a substantial volume of traffic, and that shipper assertedly has motor carrier service available. Applicant points out that the shippers on the lines were able to make alternate arrangements when service was erratic between April and November 1992, and when there was no service available between November 1992 and January 1993. Applicant adds that the area is well-served by a network of roads connecting it to all the major highways, and that most of the rail-dependent industry already has left the area.

WSSA argues that granting the abandonment exemption would further the Rail Transportation Policy of 49 U.S.C. 10101a and, conversely, that denying the exemption would hinder that policy. Specifically, it argues that requiring the continued subsidization of hopelessly unprofitable rail operations is inconsistent with the goal of fostering a sound rail transportation system. Applicant also asserts that DTRC's carrying inadequate insurance is inconsistent with the goal of operating without detriment to the public health and safety.

The Association contends that the petition for exemption does not meet the statutory requirements. It argues that WSSA's scenarios showing the unprofitability of continued operations rely on conclusory and unsupported statements concerning the ownership and value of property or the reasonableness of preferred insurance requirements. The Association also alleges an intent by WSSA to impose unilateral and potentially unjustifiable demands upon shippers for rent and insurance protection which, absent continuing regulatory oversight, constitute an abuse of market power.

## DISCUSSION AND CONCLUSIONS

The statutory standard governing abandonment or discontinuance of service is whether the present or future public convenience and necessity permit the proposed action. 49 U.S.C. 10903(a). In implementing this standard, the Board's predecessor agency, the ICC, balanced the potential harm to affected shippers and communities against the present and future burden that continued operations would impose on the railroad and on interstate commerce. *Fore River RR. Corp.--Discon. Exempt.--Norfolk County, MA*, 8 I.C.C.2d 307 (1992) (*Fore River*).

The ICC on several occasions noted that, while uncommon, it was possible for a noncarrier to seek and a rail carrier to oppose an abandonment or discontinuance under 49 U.S.C. 10903, *et seq.*, and that it was permissible to consider an "adverse" application, one brought by a party other than the carrier. See, *Fore River, supra*; *Chelsea Property Owners--Aban.--The Consol. R. Corp.*, 8 I.C.C.2d 773 (1992) (*Chelsea*), *aff'd sub nom Consolidated Rail Corp. v. ICC*, 29 F.3d 706 (D.C. Cir. 1994); *Cheatham County Rail Authority "Application and Petition" for Adverse Discontinuance*, Docket No. AB-379X (ICC served November 4, 1992), (*Cheatham County*); *Modern Handcraft, Inc.--Abandonment*, 363 I.C.C. 969 (1981) (*Modern Handcraft*); and *Thompson v. Texas-Mexican Ry. Co.*, 328 U.S. 134 (1946) (*Thompson*). The Commission noted also that any person might initiate an abandonment (or discontinuance) proposal, subject to establishing a proper interest in the proceeding. *Chelsea, supra*, at 778, citing *Thompson*.

The ICC emphasized that noncarrier "third-party" applicants have the burden to establish that the public convenience and necessity require or permit abandonment or discontinuance. *Chelsea, supra*, at 778. The Commission stated that there is a statutory duty to preserve and promote continued rail service. *Id.* at 779. The agency also observed that its role was to provide the public with a degree of protection against the unnecessary discontinuance, cessation, interruption, or obstruction of available rail service. *Modern Handcraft, supra*, at 972. The agency pointed out that it generally denied adverse applications if there was a potential for continued operations and the carrier had taken reasonable steps to attract traffic. *Chelsea, supra*, at 778, citing *Wisconsin Dept. of Transp.--Aband. Exempt.*, Finance Docket No. 31303 (ICC served December 5, 1988).

In recent years, the ICC granted several adverse applications. *Fore River* was an adverse lease discontinuance proceeding brought by a non-operating rail common carrier lessor against a lease operator. The agency granted discontinuance authority, finding that the lessee had shown a consistent pattern of failing to meet its obligations to its shippers, its employees, and its lessor, and that the lessee's operations had become a significant burden on them. In *Chelsea*, the ICC granted an adverse abandonment application when it found that the subject line had been out of service for at least 10 years and there was no possibility of restoring service.

In *Cheatham County*, the Commission approved an application by a line owner asking that the agency find that the public convenience and necessity required or permitted the discontinuance of service by the operator of the line. In that case, all three shippers on the line supported the discontinuance of the service by the operator and its replacement by a new operator that had obtained authority from the Commission. The agency found that the existing operator was "unwanted and unneeded" by the shippers on the line, and had defaulted on its obligations to the line owner. In *Tri-County Metropolitan Transportation District of Oregon--Abandonment--A Line of Burlington Northern Railroad Company in Washington County, OR*, Docket No. AB-6 (Sub-No. 348) (ICC served May 26, 1993) (*Tri-County*), the Commission's Director of the Office of Proceedings granted an unopposed adverse abandonment application, finding that no service had been provided on the subject line for 8 years and there were no prospects for future shippers. In that proceeding, the rail carrier-owner joined in support of the application 7 weeks after it had been filed.

In its 1981 decision in *Modern Handcraft*, the ICC granted the adverse abandonment application of an adjacent landowner, finding that a *de facto* abandonment of the subject line had taken place. There had been no rail service or track maintenance for 12 years, and the owner-carrier had made no serious effort to solicit traffic or reinstitute rail service; indeed, the rail line was being used for a parking lot and billboard postings.

The ICC pointed out in its decisions that its issuance, under section 10903, of a certificate describing the abandonment or discontinuance it had approved did not, of itself, force a carrier to abandon or discontinue operations. Rather, the agency noted, the certificate, even if not exercised, could serve as evidence in any court proceeding that the subject line was not required by the public for rail operations and that the agency's jurisdiction could not be cited to shield a carrier from the legitimate processes of state law. See, *Chelsea*, *supra*, at 778,

and *Fore River*, *supra*, at 310, citing *Kansas City Pub. Ser. Frgt. Operation--Exempt.--Aban.*, 7 I.C.C.2d 216, 224-226 (1990).

Discontinuance authority is permissive. Our action in granting WSSA's application would not by itself compel DTRC, BN or UP to leave the line. But our finding that the public convenience and necessity requires or permits the discontinuance of operations would remove our primary jurisdiction. That now bars WSSA from evicting DTRC, notwithstanding that their agreement has expired.

The instant proceedings involve trackage rights agreements, which the ICC, and now this Board, could approve, exempt, or deny under the provisions of 49 U.S.C. 11343 (now 49 U.S.C. 11323). When a trackage rights agreement has terminated, and the agency has denied an application to discontinue the operation, the agency has jurisdiction under section 11343 to fix the terms and conditions of continued operations. *See, Chicago and North Western Transp. Co.--Abandonment*, 354 I.C.C. 205, 208-212 (1978) (*Chicago and North Western*), discussing the Supreme Court's decision in *Thompson* and a number of other significant cases dealing with the reformation of trackage rights agreements.

More recently, in *Arkansas & Missouri R. Co. v. Missouri Pacific R. Co.*, 6 I.C.C.2d 619, 621-622 (1990) (*A&M*), the ICC reiterated the holding of *Thompson* and emphasized not only its jurisdiction over the discontinuance of trackage rights, but also its jurisdiction to fix the terms and conditions of trackage rights agreements. In *A&M*, the ICC applied its so-called "*SSW Compensation*" methodology<sup>15</sup> to determine the terms of compensation to be paid by a trackage rights grantee for the continued exercise of trackage rights over a grantor railroad's line of track. Here, WSSA requests that, in the event we deny its adverse discontinuance application in the DTRC proceeding, we fix the terms of compensation in light of the *SSW Compensation* methodology.

In support of its argument that we lack jurisdiction to issue orders affecting its operations over the NWD Corridor, DTRC cites *Delaware & H. R. Corp. Trackage Rights Agreement Modification*, 290 I.C.C. 103 (1953) (*Delaware*).

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<sup>15</sup> Under the *SSW Compensation* methodology, total compensation is the sum of three elements: (a) the variable cost incurred by the owning carrier due to the tenant carrier's operations over the owning carrier's track; (b) the tenant carrier's usage-proportionate share of the track's maintenance and operation expenses; and (c) an "interest rental" component designed to compensate the owning carrier for the tenant carrier's use of its capital dedicated to the track.

Regardless of whether DTRC holds the easement, its argument is without merit. *Delaware* essentially held that the ICC could not use any of its powers under sections 5(2) and 5(9) of the Interstate Commerce Act (later recodified in section 11343) to interfere with a valid contract that was entered into prior to the enactment of the Transportation Act of 1940, before that contract had been lawfully terminated. DTRC's purported easement was granted in recent years, more than 50 years after the enactment of the 1940 Act. The holding of *Delaware* thus is irrelevant to any rights DTRC might assert in this proceeding. See the discussion in *Chicago and North Western, supra*, at 210-211.

In making our findings in these proceedings, we will apply the law that was in effect prior to January 1, 1996, as it was applied and interpreted in the cases discussed above.

*The DTRC proceeding.* WSSA has failed to satisfy its burden of establishing that the public convenience and necessity require the proposed discontinuance of DTRC's operations. The differences between the facts of this proceeding and of those discussed above in which adverse discontinuance was granted are readily apparent.

DTRC is actively operating over the subject lines, and it wants to continue to do so. Even in cases in which the rail carrier had been operating at a loss, where there was potential for future traffic the ICC afforded weight to the carrier's intention to continue operating. See the discussion in *Chelsea, supra*, at 778-779. Here, however, the carrier is operating at a profit. It has shown that, for the 12 months ending September 30, 1995, it had an operating profit of \$17,693, a large increase over the profit it realized for the year 1994.<sup>16</sup>

WSSA contends that, when one considers the costs DTRC should be bearing for annual rental payments (assertedly \$36,100), increased annual insurance premium payments (an additional \$41,500), and monthly escrow payments for tail insurance coverage (totaling \$12,000 a year), the carrier is actually operating at a substantial loss of some \$72,000 a year. Such an argument lacks validity. Our regulations at 49 CFR 1152 Subpart D describe the standards we apply in evaluating the merits of abandonment applications and discontinuance requests. Among other things, these standards require the

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<sup>16</sup> DTRC's figures do not reflect a deduction for 12 months' tail insurance escrow payments. Even deducting for such payments, however, DTRC's figures still would show a profit of \$5,693.

measurement of so-called "avoidable costs." These are costs an applicant would cease to incur if the subject service were discontinued. WSSA would have us consider costs that never have been incurred; it would have us impose new costs for the purpose of justifying discontinuance. This would not be appropriate in evaluating the profitability of rail operations over the subject lines and, accordingly, we will not do so.

DTRC shows that it would be significantly harmed by a discontinuance. It indicates that a discontinuance would deprive it of 45% of its traffic and of the profits derived from handling that traffic. It states that discontinuance not only would deny it the opportunity to develop additional freight traffic for movement over the subject lines, but also would jeopardize its ability to continue to provide service to shippers in its only other division.

Next, shippers that DTRC is serving on both corridors have submitted evidence supporting continued operations. They express satisfaction with the service they have been receiving, promise continuing and increasing use of the carrier, and complain of the expense and unsuitability of the alternative of motor carrier service. Shippers even express a willingness to modify their schedules so as not to interfere with WSSA's annual stock shows. WSSA disparages the shipper evidence, questioning volume figures and commending motor carrier service as a viable option. The facts remain, however, that shippers have submitted statements claiming that they would be harmed by a discontinuance. None has come before us supporting the adverse discontinuance application.

Finally, WSSA has attempted to demonstrate that it would suffer harm if service were continued. WSSA's claims of hardship must be evaluated against the background of its now expired agreement with DTRC. WSSA, for whatever reason, agreed to grant DTRC trackage rights for no compensation. The burden WSSA may be bearing as a result of its agreement, which is not clearly established here, will be addressed when the matter of proper compensation is resolved.

Applicant complains also that DTRC is not carrying insurance sufficient to protect WSSA in the event a claimant wins a judgment against WSSA for a rail accident occurring on its property. As we will further discuss below, whether or not DTRC's liability insurance coverage is sufficient to protect the public from reasonably foreseeable risks and insure WSSA against reasonably foreseeable losses is not entirely clear on this record. In any event, there is no

showing that DTRC's operations are endangering the public or violating a duty to it.

The record does not establish that continued operations would impose a burden on the carrier, on the community, or on interstate commerce. To the contrary, as a whole, the record establishes that discontinuance would be detrimental to the carrier and the public and, thus, to interstate commerce.

Sections 11343 and 11351 gave the agency jurisdiction to reopen a proceeding in which a trackage rights agreement had been approved or exempted and to fix the terms and conditions of continued operations. Although WSSA would have us fix such terms here, we do not at this point in time see good cause for doing so. We note that in *A&M* the parties had agreed to submit their trackage rights dispute to the ICC for resolution following unsuccessful negotiations. Here, however, there is little to suggest that WSSA and DTRC have attempted to negotiate a new trackage rights agreement. Indeed, much of the evidence and argument suggests that the parties scarcely communicated with each other before bringing their dispute to a Federal agency.

For instance, regarding DTRC's insurance policy, the parties argue here over the matters of whether the policy is a claims made policy, whether it names WSSA as an additional insured, and whether it should contain a deductible versus a self-insured retention. The parties argue whether tail insurance coverage should extend 5 years or 7 years. As to DTRC's failure to make two payments for the tail insurance escrow fund, the parties argue over the reasons surrounding the default. Concerning the matter of track ownership, WSSA and DTRC argue over the conclusions that might be drawn from the fact that a business lease gave DTRC the right to remove track. Regarding the acreage that might be used to calculate a rental payment, the parties dispute the matter of whether a boundary should be placed 10 feet versus 15 feet from the center line of certain tracks. These are among the many matters that the parties seemingly could have resolved -- or at least demonstrated a substantial effort to resolve -- outside of a proceeding before a Federal agency. Finally, we note that, in any event, the record before us is not sufficiently complete for us to set terms and conditions even if we wanted to do so.

We will discuss the salient issues raised and will offer comments and guidance intended to assist in negotiations. We hope and expect that, in light of our comments, negotiations will prove fruitful. Should they not, the parties may bring the matter before us again by means of a petition under 49 U.S.C.

11327, the successor to former section 11351. *Compare, Chicago and North Western, supra.*

WSSA has suggested that we calculate a rental payment based on the *SSW Compensation* methodology, as set forth in *A&M*. We do not mean to suggest that WSSA ought to charge DTRC rental for use of the tracks; historically, the track throughout the Stockyards area has been used on a rent-free basis, and the reasons why WSSA has decided to seek rent now are not apparent. However, to the extent that rental payments may be a subject of the negotiation, we will explain in some more detail how our methodology might apply to a case such as this one.

As indicated, under the *SSW Compensation* methodology, the total compensation to be paid a railroad for the use of its track by another railroad is the sum of three components: (a) the variable cost resulting from the tenant railroad's operations over the line; (b) a pro rata share of the maintenance and operating expenses incurred as a result of all operations over the line; and (c) an "interest rental" component, representing a return on the owning railroad's (landlord's) investment in the rail line. WSSA neither performs any switching activities nor maintains the track structure; DTRC performs all switching activities and maintains the track. Thus, regarding components (a) and (b), WSSA incurs no costs requiring compensation.

Applicant has shown the net salvage value as ranging between \$23,400 and \$26,000. DTRC has not disputed this range, and we find it reasonable. We also find WSSA's acreage and land value figures to be reasonable. (River Corridor: 3.996 acres worth \$243,692; NWD Corridor: 1.529 acres worth \$93,245.) In calculating rent, the parties might want to make an adjustment, perhaps based on percentage of use, for those portions of the corridors that DTRC shares with BN.<sup>17</sup> Also, WSSA, DTRC, and BN may want to determine the precise distance of River Corridor track BN needs to serve Pepcol. It is not clear on the record why more than 600 feet is needed.

Liability insurance coverage exceeding \$2 million might be appropriate, but the record does not establish that \$10 million per occurrence is the amount of coverage reasonably required. The opinion of WSSA's insurance

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<sup>17</sup> Assuming the carriers share the southernmost 350 feet of the NWD Corridor and 600 feet of the River Corridor, the shared acreage and value are as follows: River Corridor--0.712 acres worth \$43,421; and NWD Corridor--0.310 acres worth \$18,905.

broker witness is unsupported. There is no showing that he, or applicant, has considered the specifics of DTRC's operations. One might inquire as to the timing, frequency, and volumes of methanol shipments. One might inquire as to the nature of the "urban" area on or near WSSA property--to what extent is it industrial versus residential? One could ask about the proximity of methanol cars to the river bordering WSSA's property and what the chances of a spill might be. Has the condition of the track, the quality and condition of the carrier's tank cars, or the carrier's past record been considered?

Applicant has presented evidence of a claim for \$10 million resulting from a rail accident involving methanol. It has not shown that the claim resulted in a judgment or that the operations of the carrier involved were similar to those of DTRC. There are no data presented concerning actual judgments resulting from switching accidents involving methanol. Nor is there any evidence provided comparing switching operations of rail carriers handling methanol with the operations of motor carriers transporting that commodity.<sup>18</sup> The testimony of DTRC's insurance agent witness, detailed above, raises other points that the parties might want to consider.

As is the case with annual policies, the amount of tail insurance coverage reasonably needed is a matter that the parties should further consider. The parties might even want to consider whether such insurance is necessary at all, as DTRC is an on-going concern that is not in apparent financial difficulty. In any event, we believe that DTRC should make the \$1,000 monthly payments it was obligated to make under its recently-expired agreement to an escrow account to fund tail insurance and property taxes. The parties' new agreement should be made with a view towards the carrier's previous promise to continue making contributions until \$30,000 has been paid.

DTRC has agreed to pay property taxes, although no one has indicated here precisely the property on which such taxes should be based. This is a matter for further discussion and negotiation between the parties. Finally, we agree with DTRC that no justification has been made here for the requirement that the carrier post an irrevocable letter of credit to secure payment of its obligations.

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<sup>18</sup> DTRC has submitted a copy of its insurance policy for the 1-year period beginning November 20, 1995. We note that the policy is a claims made policy, there is a self-insured retention of \$25,000, and WSSA is named as an additional insured.

*BN proceeding.* BN appears to hold trackage rights over both the NWD and River Corridors. BN's claim to trackage rights along the entire River Corridor is supported by the 1917 agreement. Contrary to applicant's contentions, it is not necessary that BN be able to correlate a specific track in a corridor with one identified in one of its agreements. Track may be added, deleted, or relocated in a corridor without affecting the trackage rights. Compare, *City of Detroit v. Canadian National Ry. Co., Et Al.*, 9 I.C.C.2d 1208 (1993), *aff'd sub nom. Detroit/Wayne County Port Authority v. ICC*, 59 F.3d 1314 (D.C. Cir. 1995).

As previously noted, except with respect to the southernmost 350 feet of track that it must traverse to serve Pepcol, BN does not oppose discontinuance of its rights in the NWD Corridor. In fact, it supports discontinuance. Compare, *Tri-County, supra*. BN indicates that it has not provided direct switching service along the corridor in some 15 years. It shows also that its provision of switch service along the NWD Corridor would require a rehabilitation cost of \$24,000 and an annual maintenance cost of \$4,800, and that the minimal traffic of the two shippers it could serve on the line cannot justify such expense. BN also points out that no shippers oppose its discontinuance on the NWD Corridor.

Accordingly, except to the extent discussed, we will grant discontinuance of BN's operations on the NWD Corridor. The grant will be made subject to labor protective conditions required by the provisions of 49 U.S.C. 10903(b)(2) and the financial assistance conditions that we must impose in accordance with the requirements of 49 U.S.C. 10905. We will describe the subject trackage as follows:

The section of rail line generally running along National Western Drive (in the "National Western Drive Corridor"), from the intersection of the track, on the south, with the rail line that runs generally along the east bank of the South Platte River (in the "River Corridor"), to the inactive connection with the line of track of the Denver and Rio Grande Western Railroad Company along Franklin Street, on the north, and to, but not across, the right-of-way for Race Court, on the northeast, in the Denver Stockyards, Denver, CO, a total distance of approximately 0.8 miles.

WSSA has not, however, borne its burden of establishing that the public convenience and necessity require or permit discontinuance of BN's operations on the River Corridor. Although BN has not in recent years provided service on the subject portion of that corridor, it is willing and able to do so should DTRC be unable to continue its service. Shippers

Drywall Products and Power Assist have presented evidence in support of continued operations by DTRC, which switches their traffic to BN. Presumably, had DTRC not been able to provide service, the shippers would have supported BN. In any event, applicant's plan under which BN could continue to serve Drywall Products-- involving a new agreement between applicant and BN and a lease of track by applicant to the shipper-- would seem disadvantageous to the carrier and the shipper as compared to the current arrangement.

WSSA argues that the lines are hopelessly uneconomic. This argument is unsupported vis-a-vis BN, particularly when one considers that, under its trackage rights agreement, BN has no obligation to pay rent to WSSA, and Drywall Products is a relatively heavy user of rail service, having received 144 cars during the first 9 months of 1995. WSSA claims that continuing BN's rights in place would be a burden if continuance frustrated its proposed abandonment, but it has not elaborated. It has not established how any burden it might bear would outweigh the burden BN and the shipping public have shown they would suffer from a forced discontinuance.

In light of our findings above, we see no need to determine the matter of whether BN needs 600 feet or 900 feet of the River Corridor in order to serve Pepcol. We note, however, that the record contains insufficient evidence to permit a fully informed decision on the matter.

*UP proceeding* UP has not opposed the adverse discontinuance of its trackage rights in the Stockyards area. It has not exercised those rights for some 15 years. No shippers are served under UP's trackage rights, none opposes the discontinuance, and none would be harmed by it. In the circumstances, we will grant the adverse discontinuance application subject to labor and financial assistance conditions. We will describe the involved track as follows:

The two sections of rail line, totaling approximately 1.2 miles in distance, in the Denver Stockyards, Denver, CO, consisting of: (a), in the "River Corridor," the section of line adjacent to the east bank of the South Platte River, from a point 600 feet north of the intersection of the River Corridor track with the northwestern right-of-way line of National Western Drive to the west right-of-way line of Franklin Street; and (b), in the "National Western Drive Corridor," the section of line adjacent to National Western Drive, from the intersection of the line with the south right-of-way line of East 46th Street to the intersection of the line with the east right-of-way line of Franklin Street.

*Abandonment exemption.* Under 49 U.S.C. 10505 (now 49 U.S.C. 10502), we must exempt a transaction or service from regulation when we find that: (1) continued regulations is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power. Consideration of the facts of record in light of the statutory criteria compels the conclusion that WSSA's abandonment exemption petition must be denied.

WSSA bases its case on the position that the lines in question are "hopelessly unprofitable." However, as seen, DTRC is operating at a profit. WSSA has not shown that it would lose money on the line were it to undertake the service itself.

Similarly, WSSA's contention that it is bearing the burden of subsidizing DTRC's operation also lacks support. First, WSSA claims that it is being forced to assume substantial uninsured risk. But WSSA has failed to establish the degree of risk or the level of liability insurance coverage warranted by that risk. Second, WSSA complains that it is suffering harm by making its property available to DTRC without charge. But the compensation (or lack thereof) that applicant received from DTRC and still receives from BN is determined by the provisions of an agreement freely negotiated by the parties.

It is possible that WSSA is incurring costs, or forgoing income, greater than the revenue it is receiving in the form of rental payments, that there is a resultant burden on WSSA, and that there is a concomitant burden on interstate commerce. But the record before us does not establish such facts. The record does establish that there are shippers relying on the rail service they are receiving from DTRC and that they would be harmed by a loss of service. The Association has raised valid points in this regard.

*We find:*

1. In No. AB-452 (Sub-No. IX), WSSA has failed to establish that the present or future public convenience and necessity require or permit the abandonment of any of the lines involved in this proceeding.
2. In No. AB-446 (Sub-No. 2), WSSA has failed to establish that the present or future public convenience and necessity require or permit the discontinuance by DTRC of trackage rights and service over any of the lines involved in this proceeding. WSSA also has failed to justify the

issuance of a supplemental order fixing the terms of compensation to be paid by the railroad for the exercise of trackage rights on property owned by WSSA.

3. In No. AB-6 (Sub-No. 374),

a. The present or future public convenience and necessity permit the discontinuance of trackage rights and service by BN over a portion of the National Western Drive Corridor, as described above, subject to the employee protective conditions in *Oregon Short Line R. Co.--Abandonment--Goshen*, 360 I.C.C. 91 (1979).

b. WSSA has failed to establish that the present or future public convenience and necessity require or permit the discontinuance by BN of trackage rights and service over the River Corridor.

c. Discontinuance of trackage rights and service to the extent described above will not have a serious, adverse impact on rural and community development.

4. In No. AB-33 (Sub-No. 92),

a. The present or future public convenience and necessity permit the discontinuance of trackage rights and service by UP over the National Western Drive Corridor, as described above, subject to the employee protective conditions in *Oregon Short Line R. Co.--Abandonment--Goshen*, 360 I.C.C. 91 (1979).

b. Discontinuance of trackage rights and service will not have a serious, adverse impact on rural and community development.

5. This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

*It is ordered:*

1. In No. AB-452 (Sub-No. 1X), the petition for exemption is denied.

2. In No. AB-446 (Sub-No. 2), the application and request are denied.

3. In Nos. AB-6 (Sub-No. 374) and AB-33 (Sub-No. 92),

a. The applications are granted to the extent indicated above.

b. Notice of the findings will be published in the *Federal Register* on July 3, 1996. An offer of financial assistance to allow rail service to continue must be received by the appropriate railroad and the Board by July 12, 1996. The offeror must comply with 49 U.S.C. 10905 and 49 CFR 1152.27(c).

c. Offers and related correspondence to the Board must refer to the appropriate proceeding. The following notation must be typed in bold face

1 S.T.B.

on the lower left-hand corner of the envelope: "Office of Proceedings, AB-OFA."

d. Subject to the conditions set forth above, and provided no offer for continued rail operations is received, an appropriate certificate will be issued to each rail carrier. Neither carrier may effect discontinuance of service or trackage rights prior to the effective date of its certificate.<sup>19</sup>

4. This decision is effective August 2, 1996 unless otherwise ordered by the Board.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

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<sup>19</sup> Because the Act eliminated the requirement that rail carriers file tariffs, it might not be necessary for BN or UP to cancel tariffs before discontinuing service.

## APPENDIX A

*Summary of recent history of rail operations in Denver Stockyards*

On September 22, 1989, WSSA acquired certain property adjacent to its Denver facilities from DTRC, from the Colorado and Eastern Railroad Company, and from the last members of the board of directors of the Colorado and Eastern Railway Company. The property included six parcels of railroad right-of-way, trackage, and appurtenances. Contemporaneously with its acquisition of the property, WSSA leased the parcels of railroad right-of-way, trackage, and appurtenances to DTRC to use for railroad purposes. Also on that date, DTRC assigned its newly acquired leasehold interests to Denver Railway, Inc. (DRI), and WSSA licensed certain additional property interests directly to DRI to use in performing rail services. DTRC retained a security interest in the assets WSSA assigned to DRI and in the license WSSA granted to DRI.

DRI filed with the ICC a notice of exemption under 49 CFR part 1150 to acquire and operate the rail property it was acquiring from DTRC and WSSA. An appropriate notice was published; see 54 Fed. Reg. 47,142 (1989), and DRI began providing rail service on the properties it had acquired.

Beginning in April 1992, DRI's service became erratic, and the service ceased entirely in November 1992. Shortly thereafter, on January 8, 1993, following a request by shippers located on the line, the ICC issued a directed service order authorizing Great Western Railway Company to provide service on DRI's lines. The directed service order was to expire March 9, 1993, but the ICC subsequently extended the expiration date to September 4, 1993. Great Western continued operations until that date and then terminated its service.

In the spring of 1993, during the period of directed service operations, WSSA gave DRI and DTRC notice of termination of the September 22, 1989 license agreement, and also gave them notice of default under the lease agreement of that same date. Thereafter, in the summer of 1993, DTRC foreclosed against DRI on the security interests it had retained in the assets that had been transferred to DRI. DTRC subsequently was the successful bidder at the foreclosure sale.

In August 1993, DTRC filed with the ICC a verified notice of exemption under 49 CFR part 1150 to acquire and operate the lines of railroad that were subject to its security interest. Notice subsequently was published. See, *Denver Terminal Railroad Company--Acquisition and Operation Exemption--Denver Railway, Inc.*, Finance Docket No. 32356 (ICC served September 29, 1993).

Thereafter, in the late summer of 1993, the Great Northern Transportation Company, sole owner of DTRC, agreed to sell its stock in DTRC to Thomas Z. Mars. The transaction closed on December 10, 1993. On that same date, WSSA and DTRC entered into two agreements. The first resolved disputed issues relating to the September 22, 1989 lease. The two parties agreed that the lease would be deemed to be terminated. The second

agreement granted DTRC the right to conduct rail operations over certain WSSA property until October 31, 1994.

In early October 1994, WSSA and DTRC began negotiating for an extension of the December 10, 1993 agreement. Negotiations reached an impasse. WSSA then sought adverse discontinuance of DTRC's service on the lines located on its property. In addition, as WSSA assertedly was unable to find another operator for the lines, it concurrently filed a petition seeking an exemption to abandon the lines.